

7 Official Opinions of the Compliance Board 131 (2011)

Administrative Function – Outside the Exception – Hiring lobbyist to oppose legislation in General Assembly before adopting resolution to take that position

Closed Session Procedures – Written Statement – In violation – Uninformative boilerplate – Omission of topics that were improperly discussed in closed session

Exceptions – Personnel – Outside Exception – Reclassification of employees not involving information on specific employees – Inside Exception – Interviewing prospective lobbyist

April 11, 2011

Complainant:

*Craig O'Donnell
Kent County News*

Respondent:

Cecil County Commissioners

The Compliance Board has considered the allegations of Mr. Craig O'Donnell ("Complainant") that the Board of County Commissioners ("Commissioners") of Cecil County violated the Open Meetings Act with respect to two closed meetings on February 16, 2010. Complainant alleges that the Commissioners improperly closed both meetings and then failed to provide adequate summaries of those meetings.

The dissonance between the documents and the arguments presented to us have made the true sequence of events difficult to discern. For instance, while the Commissioners assert that they were administering a pre-existing "legislative decision" in closed meetings during the day in question, the minutes they have provided to us show only that they did not adopt the resolutions embodying that decision until after those closed sessions. As explained below, we shall proceed on the basis of the minutes. Those documents establish various violations of the Act with respect to the February 16, 2010 closed meetings.

I.

Background

The Commissioners held five meetings on February 16, 2010 – an open session, a closed session, a reconvened open session, another closed session, and an evening session. All five are relevant here.

A. *The first open session.* The Commissioners held the first session as an “work session” to review the agenda of items to be discussed at its regular session that evening. During that open work session, a commissioner “requested [an] emergency resolution” concerning collective bargaining legislation that had been introduced in the General Assembly. The County Administrator stated that a resolution concerning the legislation could be introduced and voted on in one meeting if the Commissioners were to declare the matter an emergency. The Commissioners discussed the wording of the resolution and proceeded to other matters. The Board then voted to convene to a closed session.

The Commissioners documented their vote to move to closed session on a “closed meeting written statement.” The Commissioners used a form pre-printed with a checklist of the fourteen bases for closing a meeting under §10-508(a) of the Act¹ and with spaces on which to fill in the “topics to be discussed,” and “actions taken.”² The items checked were “(1) Personnel Matters,” “(7) Consult with counsel to obtain legal advice,” and “(9) Conduct collective bargaining negotiations or consider matters that relate to the negotiations.” The “topics to be discussed” section lists “Personnel matters” and “collective bargaining matters.” The open work session minutes reflect a vote to close for personnel matters and to consult with counsel.

B. *The first closed session.* The space on the closing statement for “actions taken” at the closed session contains this entry: “Discussed certain reclassification matters” and “Discussed collective bargaining legislation.” The minutes of the Board’s regular evening session summarize the closed session this way: “Topics of discussion: Personnel matters; collective

¹ All section references are to the State Government Article of the Maryland Code.

² The closing statements provided to us are either unsigned or missing a second page, and we are unable to determine whether the presiding officer completed them. §10-508(d) requires the presiding officer to complete closing statements. That officer should sign them to establish the public body’s compliance with that requirement.

bargaining matters. Actions taken: Discussed certain reclassification matters; and collective bargaining legislation.” Those minutes reflect counsel’s attendance at the closed session. The Commissioners have provided us with the minutes of that session.³

C. *The second open session.* After meeting for fifty minutes in closed session, the Commissioners reconvened their open work session and discussed various topics, including a “‘position paper’ on collective bargaining sent by e-mail.” The Commissioners then voted to close the meeting for a second time. The items checked off on the closing statement again include “Personnel matters” and “Consult with counsel to obtain legal advice.” Also checked off is “Before a contract is awarded or bids are opened, discuss a matter directly related to a negotiating strategy or the contents of a ... proposal, if public discussion ...would adversely impact the ability of the public body to participate in the competitive ... proposal process.”

D. *The second closed session.* The space on the closing statement for “topics discussed” contains this entry: “Interviewed legislative consultant.” The “Actions taken” section reads, “Directed Administrator to execute engagement agreement with G.S. Proctor & Associates, Inc., by consensus...in accordance with [County Code sections].” The regular session minutes contain the same language and reflect counsel’s presence at the closed session. The Commissioners have provided us with the minutes of the closed session.

E. *The regular evening meeting.* The Commissioners held their regular meeting that evening. There, they voted first to treat two resolutions regarding legislation in the General Assembly as “emergency items” and then to adopt those resolutions. The resolutions stated the Commissioners’ opposition to two bills, one involving arbitration of certain collective bargaining matters, and the other, a cap on Cecil County’s property tax rate. Both resolutions empowered the Commissioners “to take prompt and effective action to communicate the sense of these Resolutions” to State legislators and others.

We shall summarize the parties’ contentions as the need arises. Our task has been made somewhat easier by the Commissioners’ helpful list of the specific violations alleged by the Complainant.

³ As required by §10-502.5(c)(iii) of the State Government Article (“SG”), we shall maintain the confidentiality of those documents.

II.

Discussion

A. Whether the Commissioners violated the Act with respect to the first closed session.

The Complainant alleges that the closing statement's identification of "personnel matters" and "collective bargaining matters" was too vague, that the Commissioners' discussion of "reclassification matters" and "collective bargaining legislation" went beyond the scope of the statutory exceptions claimed for those discussions, and that the summary of the closed session was inadequate.

We begin with the Commissioners' invocation of the "personnel matters" exception to the Act's requirement that public business be discussed in a public meeting. The phrase "personnel matters" is used to refer to the exception at §10-508 (a)(1) for the discussion of "the appointment, employment, assignment, promotion, discipline, demotion, compensation...or performance evaluation of ..appointees, employees, or officials over which [the public body] has jurisdiction," or "any other personnel matter that affects one or more specific individuals...." As prior opinions have often stated, closing statements must do more than merely restate the statute. *See, e.g., 1 OMCB Opinions 23, 26 (1993)* (finding county commissioners' reference to "legal and personnel matters" insufficient and "the use of an uninformative boilerplate statement of reasons" violative of §SG 10-508(d)(2)). We thus agree with Complainant that the Commissioners' unadorned reference to "personnel matters" violated the Act. We turn to whether the actual discussion exceeded the scope of the §10-508 (a)(1) exception.

The §10-508 (a)(1) exception "does not permit closed discussion of decisions with respect to a broad category or class of personnel, where there is no discussion of the particular individuals who hold positions within the class." *1 OMCB Opinions 53, 55 (1993)*. On its face, the Commissioners' statement that they discussed "reclassification" would seem to establish that their entire discussion exceeded the scope of the exception. The closed minutes confirm their statement: while the reclassification might have involved a small class, the minutes do not reveal a discussion of matters specific to any specific individual. We acknowledge some ambiguity in the closed-session minutes as to whether the Commissioners had before them a list of the specific employees falling into the affected class. It does not appear from those minutes, however, that the identities of these specific individuals were part of the discussion. We conclude from the minutes that the discussion exceeded the scope of the exception. The next question raised by the Complainant is

whether the Commissioners' summary of the closed session complied with the Act.

The Act requires a public body to include a summary of the closed session in the minutes of its next regular session. §10-509(c)(2). As with closing statements, the "mere parroting of statutory exceptions" does not satisfy the Act. 6 *OMCB Opinions* 96, 100 (2009). While the Act does not require the disclosure of information that would compromise the confidentiality of the meeting, it does require the public body to provide the public with information that provides "an opportunity to determine the basis of what occurred at the meeting." *Id.* The public body's duty to disclose thus hinges on, and varies with, the confidential nature of the discussion. Here, the Commissioners elaborated on their closing statement by stating that they had "Discussed certain reclassification matters." Given our earlier conclusion that confidentiality does not generally attach to reclassification discussions not involving specific employees, we find this statement inadequate.

The second group of issues pertaining to this first closed session arises from the Commissioners' invocation of the §10-508(a)(9) exception for "conduct[ing] collective bargaining or consider[ing] matters that relate to the negotiation..." The Commissioners do not now claim that their discussion of State-wide collective bargaining legislation fell within that exception. Instead, they assert that every topic discussed fell within the scope of "administrative matters" to which the Act does not apply at all. Specifically, they assert that the Act did not govern the Commissioners' discussions about hiring lobbyists because "All actions by the Commissioners in respect of the County's response to SB 726 and SB 730 were ... actions which 'involve the administration of existing law or policy' ...and were therefore outside the scope of the Act. The Commissioners further respond that their summary of the closed session was adequate. In that regard, they quote from minutes summarizing a different meeting. We begin with the administrative function exclusion.

For a discussion to constitute the public body's exercise of an "administrative" function under §10-502(b), the discussion must satisfy two elements. 5 *OMCB Opinions* 42, 44 (2006). First, the topic of discussion must not fall within one of the topics excluded from the definition of "administrative function" by §10-502(b)(2). Second, the topic must involve "the administration of existing law." 5 *OMCB Opinions* 44. The second element has two sub-elements: "there [must be] an identifiable prior law to be administered, *and* the public body holding the meeting must be vested with legal responsibility for its administration." *Id.*

In this case, we need only discuss the “identifiable prior law” requirement. The minutes establish that the closed sessions occurred before the evening session at which the Commissioners adopted the resolutions to oppose the bills and to take action to communicate that opposition.⁴ In short, no “identifiable prior law” existed to be administered. As explained by the Court of Appeals of Maryland, quoting another court, one of the salient goals of the Act is to “prevent at nonpublic meetings the crystallization of secret decisions to a point just short of ceremonial acceptance.” *City of New Carrollton v. Rogers*, 287 Md. 56, 72 (1980) (citation omitted). The facts that the Commissioners, in their own words, “[d]iscussed collective bargaining legislation” at the first closed session and then, at the second closed session, chose whom to hire to lobby for their not-yet-adopted position on that and other legislation suggest a closed process of crystallization not permitted by the Act. We find it significant that, although the Commissioners themselves describe the decision to oppose the State legislation as a “legislative decision,” the minutes of the evening session reflect an adoption of the resolution without discussion.

We note the Commissioners’ argument that the resolutions and the closed sessions occurred on the same day, but the proximity of those events does not alter the chronology. If the State legislation had already been enacted, and the Commissioners had been merely discussing how to implement it, or if the Commissioners had already adopted the two resolutions, the administrative function exclusion might have applied. See 4 *OMCB Opinions* 12, 18 and n.7 (2004) (explaining the applicability of the administrative function exclusion to discussions of how to implement existing laws). However, the documents before us do not establish either of those sequences of events.

In light of our conclusion that the Act applied to the Commissioners’ discussion of the bills introduced in the General Assembly and the lack of a showing by the Commissioners that any exception to the open-meeting requirement applied, we find that the Commissioners violated the Act by not describing the discussion fully in the closing statement of “actions taken” and

⁴ We rely on the minutes for the sequence of events, rather than on counsel’s statements that a “mandate to oppose SB 726 and SB 730” already existed when the first closed session was held, and that a “legislative decision to forestall passage of SB 726 and SB 730, as reflected in the Resolutions” had been made before the 2 p.m. closed session. Although the minutes of a regular session on February 9, 2010 reflect the Board’s discussion of the collective bargaining legislation, the open minutes do not evidence a “legislative decision” made before the evening session. Although we are not set up to resolve differences in facts, we may distinguish between facts and argument, especially when a contradiction appears in one party’s submissions. Of course, if the “legislative decision” was in fact made in the closed sessions, the Commissioners have no basis for their claim that they merely acted administratively in those sessions.

the summary of the closed session. We note from the closed-session minutes that the Commissioners discussed issues related to the property tax rate, public views on collective bargaining topics, and the Commissioners' position on other pending legislation. A public entity's non-disclosure of its minutes of its discussions regarding public business violates the Act unless those matters fall within an exception or the administrative exclusion. And, even when a public entity has properly recessed an open meeting in order to discuss administrative matters in a closed meeting, §10-503(c) requires the entity to disclose various information, including the matters discussed, and to do so in the minutes of the next meeting. We encourage the Commissioners to apply these principles in addressing requests to inspect the records of these meetings.

B. Whether the Commissioners violated the Act with respect to the second closed session

The Complainant alleges that the Commissioners improperly conducted contract negotiations in a closed session. Specifically, he takes exception to the Commissioners' claim of the personnel exception and the exception under §10-508 (a)(14) for discussions "before a contract is awarded or bids opened,...directly related to a negotiating strategy or the contents of a ...proposal, if public discussion...would adversely impact the ability of the public body to participate in the competitive ... proposal process." In their response, the Commissioners offer as a fact that, during the closed session, the Commissioners interviewed a legislative consultant "to perform lobbying services in aid of the Commissioners' legislative decision to forestall passage of SB 726 and SB 730, as reflected in the Resolutions." The Commissioners additionally respond that they were simply administering their authority under the Cecil County Code to procure personal services outside of the competitive process.⁵ Further, the Commissioners assert, a County Code provision "obviates the need for *any* public hearing, competitive bidding or public award." Finally, the Commissioners respond alternatively that the §10-508(a)(14) exception applied to these facts.

We begin with the Commissioners' assertion that County law obviates the need for open "hearings" on personal services contracts. In case the Commissioners meant to suggest that County law exempts the Commissioners' meetings on personal services contracts from the Act, we shall simply point to §10-504. That section provides: "[w]henever [the Act] and another law that relates to meetings of public bodies conflict, [the Act] applies unless the other

⁵ Neither party addresses the Commissioners' original invocation of the exception for discussions with legal counsel. The closed minutes do not suggest any communication to or by counsel, and the Commissioners do not press the exception, so we need not address it.

law is more stringent.” Accordingly, when a quorum of Commissioners meets to discuss a contract, the meeting must be public unless the discussion falls within either the administrative function exclusion to the Act or an exception for which a closed meeting may be held. We turn to the administrative exclusion.

As explained above, the “administrative function” exclusion has two elements: first, the function must not fall into one of the functions excluded from the definition by §10-502(b), and, second, it must involve the administration of a pre-existing law. As defined by §10-502(b), the term “administrative function” excludes “a quasi-legislative function.” §10-502(b)(2)(iv). The term “quasi-legislative function” “means the process or act of....approving, disapproving, or amending a contract.” §10-502(j)(3). *See also, e.g., 4 OMCB Opinions* 127, 129 (2005)(finding town commissioners’ “negotiation of terms of certain contracts” quasi-legislative in nature). So, the Commissioners’ process or act of approving a contract with the lobbying firm was not an administrative function as defined by the Act. *Cf. id.* (finding administrative function exclusion inapplicable to contract negotiations). We need not consider the second element. We instead proceed to the claimed exception for the competitive procurement process under §10-508(a)(14) and for personnel matters under §10-508(a)(1).

Our discussion of §10-508(a)(14), which applies only before bid opening or the contract award and only when public discussion would adversely impact the public body’s “ability.... to participate in the competitive bidding or proposal process,” is complicated by the Commissioners’ alternative claims that this contract was both exempt from the competitive process and awarded after consideration of several firms. The minutes and closing statement for this closed session disclose that the Commissioners met with only one firm and authorized the administrator to enter into a contract with that firm. The minutes of the earlier closed session support the Commissioners’ assertion that several firms had been under consideration earlier. In any event, we do not know whether the Commissioners had selected the firm before it closed the meeting and cannot assess whether any competitive process remained to be adversely impacted.

The application of the personnel exception, which we have quoted in Section A above, is similarly problematic. The statute refers to personnel matters pertaining to employees, officials, and appointees. §10-508 (a)(1). We have applied it to the employment of outside counsel. *See 3 OMCB Opinions* 340, 343 (finding that discussion of whether to renew the town’s contract with an attorney was “in the nature of a performance evaluation of an appointee”). Although we are not prepared to interpret the personnel matters exception to include every discussion of a contract for personal services, in this

case we find no reason to distinguish between interviewing an attorney and interviewing people to present the Commissioners' position to the General Assembly. We conclude that the exception applied here and turn to whether the discussion exceeded its scope.

The closed meeting minutes reveal a discussion, albeit brief, of the policies later adopted in the two resolutions. We therefore conclude that the discussion exceeded the scope of both exceptions. It follows that the omission of that discussion from the "topics discussed" section of the closing statement and the subsequent open-meeting minutes also violated the Act.

III.

Conclusion

The exhibits introduced by the Commissioners reflect an effort to comply with the formalities of the Act: for the most part, closing statements were prepared; closing votes were taken and recorded; minutes were kept. The violations we found relate instead to the fact that neither the open meetings nor the documentation of the closed meetings conveyed to the public the process by which the Commissioners reached decisions on reclassification matters, their positions on two bills in the General Assembly, and their authorization to themselves to take "prompt and effective action as may be necessary to forestall passage of the Bills...." We conclude that the Commissioners violated the Act by discussing in closed meetings matters which exceeded the scope of the exceptions they cited and by failing in several instances to adequately identify the topics discussed and actions taken.

OPEN MEETINGS COMPLIANCE BOARD

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